THE INITIATIVE, THE REFERENDUM, AND THE RECALL

Recent Legislation in the United States[1]

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To make representative government more representative is the problem of today. The gradual process of social evolution has changed the industrial basis upon which our political institutions rest, and the increased complexity of our social organization has made the expression of the popular will more difficult. As readjustment to changing conditions is the requisite for any advancing type of life, so political progress becomes impossible unless new agencies are developed to be retained or discarded as experience may warrant.

Among the agencies for political expression, few have made more remarkable progress in the history of recent legislation than the initiative, the referendum, and the recall. State wide referendums for the adoption of State constitutional, and local referendums for local affairs, are familiar institutions in the United States, but it is only within recent years that our States have begun to adopt the initiative and the referendum for State legislation.

CONSTITUTIONAL AMENDMENTS FOR THE INITIATIVE AND THE REFERENDUM

Prior to 1907 a group of States, including South Dakota (1898), Utah (1900), Oregon (1902), Nevada (1904), and Montana (1906), had adopted constitutional provisions.[2] Some of these amendments were imperfectly drawn and lack of experience as to the practical workings of direct legislation in certain cases led to the omission of essential

[1] The writer is under obligation to the Hon. George H. Shibley, president of the National Federation for People's Rule for manuscript copies of bills and laws before they were available in published form.

[2] South Dakota, Const. (amend. 1898), art. 3, sec. 1. Utah, Const. (amend. 1900), art. 6, secs. 1 and 22. Oregon, Const. (amend. 1902), art. 4, sec. 1. Nevada, Const. (amend. 1904), art. 19, secs. 1 and 2. Montana, Const. (amend. 1906), art. 5, sec. 1.

provisions for securing the results which the amendments contemplated. The amendment for Utah was not made self-executing, and three successive legislatures have refused to provide for its operation. The amendment for Nevada provides only for the referendum, and the details of the plan are so imperfectly drawn that substantial results from the law are as yet "the substance of things hoped for" rather than the evidence of things seen. Among the earlier amendments the South Dakota provision adopted in 1898 and fortified by effective legislation in the following year has undoubtedly served as the best model for subsequent attempts to secure direct legislation in this country. This amendment is quite closely modeled after the plan so long in successful operation in Switzerland, and although an undue use of the emergency clause has somewhat weakened the efficiency of the system in South Dakota,[3] that State has secured fairly satisfactory results from the operation of her law. The lack of provision for bringing initiative measures before the legislature and for securing competing bills has been one of the serious defects of the Oregon law. Oregon voters have too often been placed at the disadvantage of choosing between the acts of groups of extremists, instead of having a choice of measures resulting from the deliberative attempts of men to find some common basis for legislative action. Prior to the legislation of 1907, the Oregon system also suffered from the lack of publicity for proposed measures. This defect is largely overcome by the new law ('07, c. 226) which makes elaborate provision for the publication and distribution of initiative bills, and of arguments to be submitted to the voters. However, the lack of opportunity for bringing proposed measures before the legislature and the impossibility of securing the submission of competing bills, lessens the guarantee for careful consideration of proposed legislation, and diminishes the voter's opportunity for discrimination and choice. The Montana amendment of 1906 introduced an innovation by requiring that two-fifths of the whole number of counties of the State must each furnish the required per cent of signers for the initiative and referendum petitions. This provision will probably make it more difficult to secure the required number of signatures, and the practical outcome of the plan will be awaited with interest by both advocates and opponents of direct legislation.

[3] See State ex rel. Lavin et al. v. Bacon et al., 1901, 14 S. D., 394.

Although the amendments secured prior to 1907 show many defects, they have pointed the way for securing direct legislation in State affairs, and the experience gained through the practical application of the several laws is being utilized to establish more effective systems.

During the legislative sessions of 1907 the campaign for the initiative and referendum was carried on with unabated fervor. Measures providing for some form of direct legislation were introduced in some twenty States and the results secured during the legislative year have made the question one of political importance throughout the country. The legislatures of Maine, Missouri, and North Dakota provided for the submission of constitutional amendments. The amendments for Maine and Missouri will be voted upon in 1908, while in North Dakota the proposed amendment must also be passed by the next legislature before being submitted to the people. The provisions[4] for the initiative and referendum in the constitution recently adopted by the people of Oklahoma are of special interest. This constitution is the first in our country to embody the principles of direct State legislation in the original draft, all of our other constitutional provisions on this subject having been secured through amendment.

Briefly outlined the Oklahoma Constitution contains the following provisions for direct State legislation: The initiative and the referendum apply both to constitutional and to statutory law. Legislative measures may be proposed by 8 per cent, and amendments to the constitution by 15 per cent of the legal voters. The total number of votes cast at the last general election for the State office receiving the highest number of votes, is made the basis on which the required number of signatures is to be counted. A referendum may be ordered by 5 per cent of the legal voters, but laws necessary for the immediate preservation of the public peace, health, or safety are exempt from the referendum provisions. Referendum petitions are to be filed with the secretary of state not more than ninety days after the final adjournment of the legislature which passed the bill on which a referendum is demanded. All elections on measures referred to the people are to be had at the next general election held throughout the State, except when the legislature or the governor shall order a special election for the express

[4] Oklahoma, Const. 1907, art. 5, secs. 1–8; art. 18, sec. 4a–5b; and art. 24, sec. 3.

purpose of making such reference. Initiative measures require a majority of the votes cast at the election, while only a majority of the votes cast on a referred measure are necessary to give it effect. The referendum may be demanded by the people against one or more items, sections, or parts of any act of the legislature. The veto power of the governor does not extend to measures voted on by the people. Any measure rejected by the people through the powers of the initiative and referendum, cannot again be proposed by initiative within three years thereafter, by less than 25 per cent of the legal voters.

The proposed amendment for North Dakota is modeled more closely after the Swiss law, and has many points of advantage over the provisions in the Oklahoma Constitution which follows the Oregon amendment in a number of particulars. The North Dakota provision for bringing the initiative measures before the legislature and for securing the submission of competing bills is an especially strong feature. Under the North Dakota plan 8 per cent of the legal voters may propose a measure by initiative petition. Every such petition must include the full text of the measure proposed, and must be filed with the secretary of state not less than thirty days before any regular legislative session and he is required to transmit the same to the legislature as soon as it convenes. Initiative measures take precedence over all measures in the legislative assembly except appropriation bills, and are either to be enacted or rejected without change or amendment within forty days. Any initiative measure enacted by the legislature is subject to referendum petition or it may be referred by the legislature to the people for approval or rejection. If it is rejected, or no action is taken upon it by the legislature within forty days, the secretary of state is to submit it to the people for approval or rejection at the next ensuing regular general election. The legislature may reject any measure proposed by initiative petition and propose a different one to accomplish the same purpose, and in any such event both measures are to be submitted by the secretary of state to the people for approval or rejection at the next election. If conflicting measures submitted to the people at the same election are approved by a majority of the votes severally cast for and against the same, the one receiving the highest number of affirmative votes becomes valid and the other is thereby rejected.

The North Dakota plan also makes provision against an undue use of the emergency clause by the legislature. When it is necessary for the immediate preservation of the public peace, health, or safety that a law shall become effective without delay, such necessity and the facts creating the same must be stated in one section of the bill. If, upon aye and no vote in each house, two-thirds of all the members elected to each house vote on a separate roll call in favor of the law going into instant operation, it becomes operative upon approval of the governor. The referendum may be ordered (except as to laws necessary for the immediate preservation of the public peace, health, or safety), as to any measure or any parts, items, or sections of any measure passed by the legislature either by a petition signed by 5 per cent of the legal voters, or by the legislature by a majority vote. The filing of referendum petition against one or more items, sections or parts of an act is not to delay the remainder of that act from becoming operative. Referendum petitions against measures passed by the legislature are to be filed with the secretary of state not more than ninety days after the final adjournment of the legislative session. The veto power of the government does not extend to measures referred to the people. All elections on measures referred to the people of the State are to be had at biennial regular general elections except as provision may be made by law for a special election or elections. Any measure referred to the people is to take effect when it is approved by a majority of the votes cast thereon, and is to be in force from the date of the official declaration of the vote. The whole number of votes cast for justices of the supreme court at the regular election last preceding the filing of any petition for the initiative or for the referendum is made the basis on which the number of legal voters necessary to sign such petition is to be counted. The amendment is self executing, but legislation may be enacted especially to facilitate its operation.

The amendment[5] submitted in Maine is similar in its most important points to that of South Dakota. Provision is made against an undue use of the emergency clause and also for securing the submission of competing bills from the legislature. A peculiarity of the Maine law is that it provides for a definite number, instead of a percentage of

[5] Maine, Resolves, 1907, c. 121.

signatures to propose or refer measures; thus, it requires 12,000 signatures for initiative and 10,000 for referendum petitions. This is probably due to the fact that the legislature of Maine considered the population of the State a fairly fixed element. The amendment applies to statutory law, but it does not provide for changes in the constitution through initiative petitions.

The proposed amendment[6] for Missouri provides that laws and amendments to the constitution may be proposed by 8 per cent and the referendum may be invoked by 5 per cent of the legal voters. There is also a provision that the number of signatures required for initiatives and referendum petitions must be secured in each of at least two-thirds of the congressional districts in the State. The amendment does not apply to laws necessary for the immediate preservation of the public peace, health, or safety nor to laws making appropriations for the current expenses of the State government, for the maintenance of the State institutions, and for the support of the public schools. The lack of provision for bringing proposed measures before the legislature and for securing the submission of competing bills must be considered a weak point in the Missouri plan.

THE ADVISORY INITIATIVE AND ADVISORY REFERENDUM FOR STATE MEASURES

The difficulty of securing constitutional amendments for the initiative and the referendum have led to the development of other methods for securing at least partial systems of direct State legislation.

The Illinois public opinion system (Laws 1901, p. 198) adopted in 1901, provides for an expression of opinion by electors on questions of public policy at any general or special election. Under this law the submission of any question for an expression of public opinion may be secured, on a written petition signed by 25 per cent of the registered voters of any incorporated town, village, city, township, county, or school district; or by 10 per cent of the registered voters of the State. The petition must be filed with the proper election officers, in each case, not less than sixty days before the date of the election at which the question is to be considered, and not more than three propositions

[6] Missouri, Laws, 1907, p. 452–3.

may be submitted at the same election. This law is a step toward the advisory initiative, but it does not go quite so far, as the voter merely expresses an opinion instead of being able to instruct his representatives by direct ballot. The public opinion system has been used in Illinois on a number of State questions, but as the candidates for the legislature were not pledged to obey the wishes of their constituents, these expressions of public opinion have not been very effective in securing the legislation desired.

A vigorous campaign for the advisory initiative and the advisory referendum was conducted in a number of States during the past legislative year. The question excited special interest in Massachusetts where a pledged majority of the legislature for the advisory initiative, broke their pledges by refusing to pass the proposed bill. Other States had similar experiences with representatives pledged to vote for the advisory system of direct legislation, although the plan continues to receive the approval of public men of all parties. In his last message to the Minnesota legislature, Governor Johnson called attention to the merits of this system and declared himself to be "firmly of the opinion that such legislation is desirable."

The Texas system (Laws 1905, c. 11, sec. 140) provides for the advisory initiative within the parties at primary elections. The law applies "whenever delegates are to be selected by any political party to any State or county convention, or candidates are instructed for, or nominated." Under this law, 10 per cent of the voters in any political party may propose policies and candidates and secure a direct party vote thereon. Petitions are to be filed with the chairman of the county or the precinct executive committee at least five days before the tickets are to be printed, and the chairman may require a sworn statement that the names of the applicants are genuine. The number of signatures necessary for a petition is to be determined by the votes cast for the party nominee for governor at the preceding election. It is made the duty of the chairman to submit any proposition for which a petition is filed, and the delegates selected at that time are to be considered instructed for whichever proposition a majority of the votes are cast. Provision is also made that all additional expenses of printing any proposition on the official primary ballot is to be paid for by the parties requesting the same.

Advocates of direct legislation have recently been carrying on a campaign for the advisory initiative and advisory referendum for national affairs. One hundred and ten members of the present house of representatives are pledged to vote for the establishment of the advisory referendum for acts of congress or bills passed by either house, and for the establishment of the advisory initiative for the following topics: civil service; immigration; interstate commerce, including parcels post; trial by jury or any modification of the law of injunction; the eight hour day in government contract work; the initiative and referendum; the election of United States senators by the people; and proportional representation.

THE RECALL

The recall is another political institution developed in Switzerland, which is being established in this country in an increasing number of municipalities. At the present time it is in existence in a large number of cities[7] in California and in Washington. It is also to be found in certain cities in Idaho, Iowa, Michigan and Texas. The validity of the recall has been sustained in a number of court decisions.[8] Recently the California State appellate court of the second district held that

[7] Among the California cities which have secured the recall as a charter right are: Los Angles (Cal. Laws 1903, c. 6); San Diego (Cal. Laws 1905, c. 11); San Bernardino (Cal. Laws 1905, c. 15); Pasadena (Cal. Laws 1905, c. 20); Fresno (Cal. Laws 1905, c. 23); Santa Monica (Cal. Laws 1907, c. 6); Alameda (Cal. Laws 1907, c. 7); Long Beach (Cal. Laws 1907, c. 15); Riverside (Cal. Laws 1907, c. 25).

In Washington, Seattle secured the recall in 1906, and in 1907 the Spokane city council adopted an ordinance for the recall to be submitted to the people as a proposed amendment to the charter. Under c. 241, Laws 1907, provision is made for the recall in all cities of the second class. This includes cities having a population between 1500 and 10,000.

For Idaho, see Lewiston charter (Laws 1907, p. 349).

Des Moines adopted the recall under the Iowa Law (1907, c. 48) providing for the commission system of government.

In April, 1906, Grand Rapids, Mich., adopted the recall under the provisions of her new charter (Mich. Laws 1905, no. 593), establishing the initiative and referendum for charter amendments.

[8] Davenport v. City of Los Angeles, et al., 1905, 146 Cal., 508; Good v. Common Council of City of San Diego, 1907, 90, p. 44. (Cal. App.)

Also compare Rex v. Richardson, 1758, 1 Burr, 517, in which it was held that "the power to remove a corporate officer from his office for reasonable and just cause is one of the common law incidents of all corporations."

the act of the city council in accepting the petition for the recall of a councilman was merely ministerial, and that when a petition bears the proper number of names of electors, as shown by the clerk's certificate, no discretion remains with the council, but it is its duty to call an election.[9]

A typical example of the recall for city officials is found in the new law (1907, c. 48) of Iowa, which provides for the adoption of the commission system of government by cities having a population of 25,000 or over. Section 18 provides that the holder of any elective office may be removed at any time by the electors qualified to vote for a successor of the incumbent. The procedure for removal is as follows: A petition signed by electors entitled to vote for a successor to the incumbent sought to be removed, equal in number to at least 25 per cent of the entire vote for all candidates for the office of mayor cast at the last preceding general municipal election, demanding an election of a successor of the person sought to be removed, is to be filed with the city clerk. This petition is to contain a general statement of the grounds for which the removal is sought. The signatures to the petition need not all be appended to one paper, but each signer must add to his signature his place of residence, giving the street and number. One of the signers of each paper is to make oath before an officer competent to administer oaths that the statements therein made are true as he believes, and that each signature to the paper appended is the genuine signature of the person whose name it purports to be. Within ten days from the date of filing the petition the city clerk is to examine the voter's register to ascertain whether or not the petition is signed by the requisite number of qualified electors. If necessary, the council is to allow him extra help for that purpose; and he is to attach his certificate to the petition, showing the result of his examination. If by the clerk's certificate the petition is shown to be insufficient, it may be amended within ten days from the date of the certificate. Within ten days after such amendment, the clerk is to make like examination of the amended petition, and if his certificate shows the same to be insufficient it is to be returned to the person filing the same; without prejudice, however, to the filing of a new petition to the same effect.

[9] Good v. Common Council of the City of San Diego, 1907, 90, p. 44.

If the petition is deemed to be sufficient, the clerk is to submit the same to the council without delay, and if it is found to be sufficient, the council is to order and fix a date for holding the election, not less than thirty days or more than forty days from the date of the clerk's certificate to the council that a sufficient petition is filed.

The council is to provide for publication of notice and all arrangements for holding the election, which is to be conducted and returned in all respects as other city elections. The successor of any officer so removed is to hold office during the unexpired term of his predecessor. Any person sought to be removed may be a candidate to succeed himself, and unless he requests otherwise in writing, the clerk is required to place his name on the official ballot without nomination. In any removal election, the candidate receiving the highest number of votes is to be declared elected. Unless the incumbent receives the highest number of votes at the election he is deemed to be removed from the office upon the qualification of his successor. In case the party who receives the highest number of votes fails to qualify, within ten days after receiving notification of election, the office is deemed vacant.

The new charter for Lewiston, Idaho (Laws 1907, p. 349) has similar provisions for the recall. In addition it safeguards the city from possible misuse of the law by providing that no petition for removal is to be filed until the person has been in office at least ninety days, and that no person is to be required to stand for reëlection more than once during the term for which he was elected.

JUDICIAL INTERPRETATION OF DIRECT LEGISLATION

The validity of legislation for the initiative and referendum has been sustained in a number of recent court decisions. The former contention that the use of direct legislation substituted a pure democracy for a republican form of government, no longer receives serious consideration.

In a case decided by the supreme court of California in 1906, the court declared[10] that the provision of the Federal Constitution (art. 4, sec. 4) declaring that the United States shall guarantee to every State a republican form of government, is not violated by the initiative

[10] In re Pfahler, 1906, 88, p. 270.

provision of a city charter[11] authorizing direct legislation as to strictly local affairs by the citizens, in case the council refuses to enact the same. In an earlier decision[12] the supreme court of Oregon similarly held that the initiative and referendum amendment to the Oregon Constitution, did not abolish or destroy the republican form of government, or substitute another in its place. The court declared, "The representative character of the government still remains. The people have simply reserved to themselves a larger share of legislative power."

Madison defined a representative government to be "a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a given period or during good behaviour."[13]

Recent court decisions seem to be returning to this inclusive idea of representative government. On the basis of this broader interpretation, direct legislation may prove to become one method of making representative government more representative.

[11] Charter of Los Angeles, Cal. Laws 1903, c. 6.
[12] Kadderly v. Portland, 1903, 44 Or., 118.
[13] *The Federalist*, 302.